90-1818

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Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

October Term, 1990

ROBERT E. HOOVER,

*Petitioner,*

v.

ARMCO INC.,

*Respondent.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. May attorney's fees be assessed under the "bad faith" exception to the American Rule against an unsuccessful plaintiff on the basis that his claim of retaliatory discharge under the Age Discrimination in Employment Act was frivolous or baseless, where his evidence was sufficient to establish a *prima facie* case of retaliation and to present questions of fact which were submitted to and decided by a jury?

2. May attorney's fees be assessed against an unsuccessful plaintiff under the "bad faith" exception to the American Rule where there was no evidence of, and the district court made no finding of, an ulterior or improper motive in the initiation or prosecution of a claim of discrimination under the Age Discrimination in Employment Act?

3. May the circuit court of appeals make independent findings of fact with regard to a plaintiff's ulterior or improper motive and other related matters so as to provide a basis to affirm an order assessing attorney's fees, where the district court made no such findings?

4. May attorney's fees be assessed against an unsuccessful plaintiff under the "bad faith" exception to the American Rule for merely pleading a claim under the Age Discrimination in Employment Act concerning an adverse employment action which was the subject of an untimely administrative charge, and as to which affirmative defenses are waived unless raised and pursued by the defendant?

## QUESTIONS PRESENTED – Continued

5. May attorney's fees be assessed against an unsuccessful plaintiff under the "bad faith" exception to the American Rule for prosecuting a time-barred claim of discrimination under the Age Discrimination in Employment Act where the plaintiff abandoned the claim immediately after the employer-defendant moved for summary judgment on the ground of the bar of the statute of limitations?

6. May attorney's fees be assessed against an unsuccessful plaintiff under the "bad faith" exception to the American Rule for pleading a time-barred act of discrimination as an evidentiary fact in his complaint?

## LIST OF PARTIES

The parties to the proceedings below were petitioner Robert E. Hoover and respondents Armco, Inc. and Armco Inc. Noncontributory Pension Plan. The Pension Plan obtained summary judgment prior to trial. It filed a cross-appeal to the Eighth Circuit regarding attorney's fees but the issues were resolved against it.

Armco, Inc. directly owns less that 100% of these subsidiaries:

Armco Argentina S.A.

Armco Chile Sociedad Anonima

Armco Columbiana S.A.

Armco Delloye SA (Ardel)

Armco do Brasil S.A.

Armco Industrial S.A.

Armco Marsteel Alloy Corporation

Armco Merchandising S.A.

Armcopaxi S.A.

Armco Peruana S.A.

Armco SpA

Armco Uruguaya S.A.

Black River Lime Company

Control International, Inc.

The National Supply Company of Mexico, S.A.

Northern Land Company

**LIST OF PARTIES – Continued**

Productora de Alambres y Derivados S.A.
Prolansa

Productos Metalicos Armco S.A.

Risk Consultants Inc.

Petitioner has been unable to ascertain whether Armco, Inc. indirectly owns less that 100% of other subsidiaries, as where the subsidiaries listed above own portions of other companies.

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No. _____

In The

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October Term, 1990

ROBERT E. HOOVER,

*Petitioner,*

v.

ARMCO INC.,

*Respondent.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## PETITION FOR WRIT OF CERTIORARI

Petitioner Robert E. Hoover respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on September 25, 1990.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit has been reported at 915 F.2d 355. It is reprinted in the appendix, pp. 1a-8a, *infra*.

The order of the U.S. District Court for the Western District of Missouri (Stevens, J.), finding petitioner liable for fees is reported at 691 F.Supp. 184. It is reprinted in the appendix, pp. 9a-22a, *infra*.

The decision of the Court of Appeals for the Eighth Circuit denying rehearing is reprinted in the appendix, p. 23a, *infra*.

## JURISDICTION

The judgment of the Eighth Circuit Court of Appeals, in respondent's favor, was entered September 25, 1990. The Eighth Circuit denied a timely petition for rehearing on November 20, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

## STATEMENT OF THE CASE

Petitioner filed suit against respondent in the United States District Court for the Western District of Missouri seeking relief under the Age Discrimination in Employment Act, 29 U.S.C. Sec. 621 *et seq*. He cited these discriminatory acts: (1) his demotion from foreman to mill scheduler in March 1982; (2) his demotion from mill scheduler to security guard in June 1983; (3) failure to repromote him between 1983 and 1986; (4) discriminatory denial of an application for a discretionary retirement pension; and (5) his 1986 discharge in retaliation for opposing its earlier acts of discrimination. Jurisdiction was founded upon 28 U.S.C. Sec. 1337.

The issues on appeal and in this petition concern the district court's assessment of $24,375.66 in attorney's fees against him in connection with his 1982 demotion and 1986 discharge claims.

On October 24, 1983, petitioner filed an administrative charge with the Kansas City Human Relations Department (Kansas City, Mo., ordinances prohibited age discrimination in employment within the corporate city limits). Petitioner cited Armco for violations of the ordinance with regard to "the demotions [he] received", including his 1982 demotion. However, the local agency charge was filed more than 180 days after the March 1982 demotion, and the EEOC charge was filed more than 300 days after the demotion.

Petitioner filed this ADEA suit against Armco Inc. on March 3, 1986. Count I thereof charged discrimination with respect to four acts, including his 1982 and 1983 demotions. Armco's answer alleged that Count I was barred "in whole or in part" by the statute of limitations but did not further specify which claims included in Count I were alleged to be time-barred.

On March 12, 1986, petitioner was discharged from employment, and on March 20, 1986, he filed a retaliation charge with the EEOC citing his termination. In 1987, the complaint was amended to include the retaliatory discharge claim.

On October 15, 1987, Armco Inc. filed a motion for partial summary judgment with respect to the 1982 and 1983 demotions, on the ground that each was barred by the applicable statute of limitations for lack of a timely administrative charge.

Petitioner conceded in response that the administrative charge filed with respect to the 1982 demotion was not timely, and summary judgment was entered as to that claim alone on March 17, 1988. In all other respects, summary judgment was denied. Petitioner did not thereafter seek relief for the 1982 demotion, but included the act as an evidentiary fact in his Fourth Amended Complaint.

Trial began on April 11, 1988, before a jury. Petitioner presented sufficient evidence of retaliatory intent in connection with his 1986 discharge to establish a *prima facie* showing. Respondent's motion for directed verdict at the close of plaintiff's case was overruled by the district court. The employer presented its own evidence, and petitioner presented rebuttal evidence. Respondent's motion for directed verdict at the close of all evidence was taken under advisement and the court submitted the retaliation claim (and three other age discrimination claims) to the jury, which returned a defendant's verdict.

On August 4, 1988, the district court granted the employer's motion for attorney's fees in part and on February 8, 1989, entered an order assessing $24,375.66 in fees as to the 1982 demotion and the retaliatory discharge claims. The motion for fees as to all other claims was denied.

Applying the "bad faith" exception to the American Rule, *Alyeska Pipeline Service v. Wilderness Society*, 421 U.S. 240 (1975), the district court ruled that the *initiation*[1] of

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[1] In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978), a Title VII case, this Court noted the difference between

(Continued on following page)

the time-barred 1982 demotion claim supported its determination of bad faith. *See* p. 15a, *infra*. It further ruled that the retaliatory discharge claim was "without foundation" and "should never have been filed." *Id.* p. 18a. The court's account of the evidence misstated the trial testimony in certain crucial respects.

Nowhere did the district court find that petitioner brought suit for some improper or ulterior motive, such as vexation or delay. Nowhere did it reject his contention that the claims were pursued out of a genuine belief that petitioner was the victim of age discrimination and retaliation. The court conducted no post-trial evidentiary hearing and received no additional evidence as to petitioner's subjective motives in commencing or maintaining his claims.

On appeal, the Eighth Circuit affirmed the district court's order by a 2-1 vote. The majority ruled that the mere *initiation* of the 1982 demotion claim did not establish "bad faith" as a matter of law, but that petitioner's *maintenance* of the claim after the employer first raised the statute of limitations in its answer supported a finding of bad faith. *See* pp. 5a-6a, *infra*.

The Eighth Circuit also affirmed the assessment of fees in connection with the retaliation claim, stating that it was "without foundation" and "never should have been filed." *Id.* p. 4a. The Eighth Circuit did not cite or

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initiating a claim that is frivolous or unreasonable, and continuing to litigate "after it clearly became so." *See also Ford v. Temple Hosp.*, 790 F.2d 342, 349 (3rd Cir. 1986).

discuss petitioner's evidence supporting the employer's retaliatory intent. It also misstated the trial testimony in important respects.

The circuit court majority further expressed its own view that petitioner had brought the retaliation claim "out of spite". *Id.* p. 5a. The district court had made no such factual finding.

## REASONS FOR GRANTING THE WRIT

**I. The Eighth Circuit's decision that petitioner's claim for retaliatory discharge was frivolous and without foundation is in error and in direct conflict with decisions of the Fourth, Fifth and Eighth Circuits, in that the claim was meritorious as a matter of law because petitioner made a *prima facie* showing of retaliatory intent and the district court denied respondent's motion for directed verdict and submitted the claim to a jury.**

In *Crawford v. Western Elec. Co., Inc.*, 614 F.2d 1300, 1321 (5th Cir. 1980), the court held that a discrimination case cannot be called baseless or frivolous as a matter of law where the plaintiff establishes a *prima facie* case.

The Eighth Circuit reached a similar conclusion in *Davis v. City of Charleston*, 917 F.2d 1502 (1990). There the court reversed an award of attorney's fees to a prevailing defendant under 42 U.S.C. Sec. 1988, holding that the necessary finding that the suit was "frivolous, unfounded, and vexatiously brought and pursued" was not "well-supported" by the record. Specifically, the plaintiff's evidence "presented a fact issue" as to the plaintiff's claim and therefore "suffice[d] to overcome the

bases for any finding that Davis' claim was frivolous, unfounded or vexatiously brought."

In *Glymph v. Spartanburg General Hosp.*, 783 F.2d 476, 480 (4th Cir. 1986), the court reversed an award of fees against a Title VII plaintiff, noting that the trial court had denied summary judgment in favor of the employer and denied its motion to dismiss at the close of the plaintiff's evidence. Because the plaintiff had "arguably" made out a *prima facie* case, the appellate court ruled her claim was not frivolous, unreasonable or without foundation.

Petitioner's evidence established a *prima facie* case of retaliatory discharge, prohibited by 29 U.S.C. Sec. 623(d), under the principles of *Womack v. Munson*, 619 S.W.2d 1292, 1296 (8th Cir. 1980), *cert. denied*, 450 U.S. 979 (1981). He demonstrated his participation in statutorily protected activity (informal complaints, two formal administrative charges, and commencing suit before his termination), and showed that he was disciplined, suspended and ultimately discharged in the wake of those complaints.

Petitioner's evidence indicated a causal connection between his protected activities and his discharge. He showed a course of disciplinary conduct taken at the time of his complaints of unfair treatment, including reports placed in his personnel file of inconsequential rule violations, of conduct which did not violate company rules, of conduct for which other employees were not written up, and of alleged conduct for which Armco merely assumed but never verified his involvement. He was suspended on the basis of those reports.

In February 1986, petitioner took what he described as an emergency leave to visit his elderly father-in-law in failing health in Colorado. During the visit, petitioner went skiing for several days. On his return, he was suspended a second time and commenced this suit. The day after respondent was served with process, petitioner was terminated for taking the trip to Colorado, which Armco stated was an unauthorized leave. Petitioner argued that, after 26 years of service to Armco, discharge was too extreme a punishment. Armco admitted that other employees had taken unauthorized leave but identified no one who had ever been disciplined or discharged.

The district court acknowledged that petitioner's evidence of retaliation, if believed by the jury, would have supported a verdict in his favor: respondent's motion for directed verdict at the close of plaintiff's case was overruled; its motion for directed verdict at the close of all evidence was taken under advisement and the claim was submitted to the jury.

As a matter of law, petitioner's claim for retaliatory discharge was not frivolous or without foundation and could not support a shifting of attorney's fees under the "bad faith" exception to the American Rule. The district court's decision that the retaliation claim "should never have been brought", and the Eighth Circuit's affirmance on the same rationale, conflict with the decisions from the Fourth, Fifth and Eighth Circuits cited above.

**II. The Eighth Circuit's decision that petitioner's claim for retaliatory discharge was brought for an improper motive is in error, is not supported by the record, is in direct conflict with decisions of the Eighth Circuit and other courts, and involves a departure from acceptable judicial procedure because the district court made no finding of improper motive in the initiation or prosecution of the claim and the Eighth Circuit lacked the authority to make such a finding on its own.**

Several circuits have ruled that district courts must make specific findings of an ulterior or improper motive in the initiation or prosecution of a frivolous or groundless suit before attorney's fees may be shifted under the "bad faith" exception. *Actors' Equity Ass'n v. American Dinner Theatre*, 802 F.2d 1038, 1043 (8th Cir. 1986); *Autorama Corp. v. Stewart*, 802 F.2d 1284, 1288 (10th Cir. 1986); *Ford v. Temple Hospital*, 790 F.2d 342, 347 (3rd Cir. 1986); *Nemeroff v. Abelson*, 620 F.2d 339, 348 (2nd Cir. 1980). The *Nemeroff* Court explained:

> [T]here must be "clear evidence" that the claims are "entirely without color *and* made for reasons of harassment or delay or for other improper purposes." [quoting *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078, 1088 (2nd Cir. 1977)] [emphasis in *Nemeroff*]

The district court conducted no hearings, solicited no facts, and made no finding whatsoever of an ulterior or improper motive. Judge McMillian, dissenting from the majority opinion filed in the Eighth Circuit, noted the absence of such a finding. *See* p. 7a, *infra*.

Instead of reversing the district court, however, the majority affirmed, stating its "view" that petitioner "brought and doggedly pursued a baseless retaliatory

discharge claim out of spite." *Id.* pp. 4a-5a. This Court has unequivocally forbidden such independent factfinding by the circuit courts. *Icicle Seafoods, Inc. v. Worthington,* 475 U.S. 709, 714 (1986). *See also Mars Steel Corp. v. Continental Bank N.A.,* 880 F.2d 928, 933-7 (7th Cir. 1989).

Additionally, the record is utterly devoid of any factual basis for the majority's gratuitous "view" (or a *de novo* finding) that petitioner was motivated by any reason other than his sincere belief that he was the victim of age discrimination and retaliation in bringing and prosecuting his claims. Respondent attempted to ascribe alleged "greed" as a motive, but its suggestion was wholly ignored and rejected by both the district court and the court of appeals.

The district court's order is not supported by the necessary factual findings. The Eighth Circuit's affirmance is likewise unsupported by "clear evidence" in the record, and in "finding" an improper motive on its own the court has departed from the accepted course of judicial proceedings and violated this Court's commands.

**III. The Eighth Circuit's decision that petitioner's time-barred claim for discriminatory demotion was maintained in bad faith is factually and legally in error, conflicts with a Third Circuit decision, and is not supported by the record, in that the claim was abandoned and not prosecuted at all immediately after respondent moved for summary judgment thereon.**

In Count I of his original complaint, filed March 3, 1986, petitioner alleged discrimination in his 1982 demotion, his 1983 demotion, the denial of a discretionary

retirement pension, and a failure to repromote him. Among the defenses pleaded in its answer, Armco stated that "Count I is barred in whole or in part by the applicable statute of limitations under 29 U.S.C. Sec. 255 and Sec. 626(e)." Armco did not specify which of the four claims contained therein may have been barred.

Petitioner realleged his 1982 demotion in four subsequent amended complaints and respondent restated the same limitations defense *in haec verba*.

On October 15, 1987, respondent moved for partial summary judgment as to the 1982 demotion claim. In response, petitioner immediately conceded that the act occurred more than 300 days earlier than the EEOC charge and was not remediable. Summary judgment was granted on March 17, 1988, on that claim alone.

The district court found that filing an untimely claim was indicative of bad faith and assessed fees for the *initiation* of the 1982 demotion claim. *See* p. 15a, *infra*.

The court of appeals, citing *Ford v. Temple Hosp.*, 790 F.2d 342, 348-9 (3rd Cir. 1986), acknowledged that merely initiating a time-barred claim could not justify an award of attorney's fees as a matter of law. But the court then affirmed the award of fees, despite *Ford*, on a ground both legally and factually erroneous – that petitioner *continued to litigate* the claim and "did not relinquish" it "until the district court granted Armco summary judgment". *See* pp. 5a-6a, *infra*.

On facts similar to those present here, the court in *Ford* noted that an affirmative defense could be waived

by a litigant's conduct. Thus, it held, the critical demarcation between initiating and maintaining a time-barred claim was the defendant's motion for summary judgment – when the employer seeks a disposition of the claim in light of its affirmative defense.

Since fees cannot be assessed merely for initiating such a claim, then "as a matter of law" the losing party could not be liable for any legal costs preceding the time when the summary judgment motion was filed. 790 F.2d at 349. The *Ford* Court affirmed the award of fees because the plaintiff's attorney continued to press the claim after the summary judgment motion. In this case, all of the fees assessed by the district court were for legal work performed *before* the summary judgment motion was filed.

Moreover, the Eighth Circuit's statement that petitioner did not relinquish his 1982 demotion claim until summary judgment was entered is absolutely inaccurate. Petitioner never prosecuted the claim after the summary judgment motion was filed. He conceded the 1982 demotion could not be remedied promptly in his first response (filed January 15, 1988) to that motion and never asserted it as an independent claim thereafter. That the Eighth Circuit even engaged in such factfinding violates *Icicle Seafoods, Inc., supra.*[2]

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[2] The Eighth Circuit incorrectly stated that the district court "found Hoover knowingly *brought and pursued* a demotion claim barred by the statute of limitations." *See* p. 5a, *infra* (emphasis added). The district court found only that the claim had been pleaded or filed in bad faith. *See* p. 15a and fn. 4 at pp. 15a-16a, *infra*.

Petitioner had the right to plead the 1982 demotion as an evidentiary fact probative of the employer's discriminatory intent in accordance with prior decisions and to present such evidence at trial. *Hogan v. American Tel. & Tel. Co.*, 812 F.2d 409, 410 (8th Cir. 1987); *Williams v. Anderson*, 562 F.2d 1081, 1086 n. 7 (8th Cir. 1977). It was an abuse of discretion to assess fees for attorney time Armco would nonetheless have been compelled to spend investigating and opposing such evidence of illegal intent.

The district court improperly assessed attorney's fees for merely asserting the 1982 demotion claim; the court of appeals improperly affirmed the order on a different ground which conflicts with a decision of the Third Circuit and is factually inaccurate and unsupported by the record.

## IV The Eighth Circuit's decision that petitioner continued to litigate the time-barred claim for discriminatory demotion in bad faith is in error and is not supported by the record in that the district court made no finding of improper motive in the initiation or maintenance of the claim.

As with the retaliation claim, the district court made no findings of an ulterior or improper motive in the initiation of the 1982 demotion claim. Such a finding is required by *Actors' Equity* and the decisions from several other circuits mentioned above.

The court of appeals cited no ulterior or improper motive in deciding that fees were justified by its erroneous view that petitioner continued to litigate the claim after the summary judgment motion was filed. It did not

even address the district court's failure to find an improper motive.

## CONCLUSION

The Eighth Circuit has sanctioned the assessment of attorney's fees against a plaintiff whose claims cannot be deemed frivolous or baseless as a matter of law, and without a finding of ulterior or improper motive. Its ruling conflicts with decisions of the Second, Third, Fourth, Fifth, Eighth, and Tenth Circuits, and it has departed from acceptable judicial procedure in so doing.

The Eighth Circuit's disposition of this case would allow shifting of fees against a plaintiff or his attorney even though they justifiably believe they can make a *prima facie* showing of discrimination. The circuit court's approach would produce the very chilling effect upon civil rights plaintiffs of which this Court and others have warned.

The determination of this Court is needed to resolve the conflict and correct the errors of the courts below. For these reasons, this Petition for Writ of Certiorari should

be granted. The decisions of the Eighth Circuit and the district court should be vacated.

Respectfully submitted,

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# UNITED STATES COURT OF APPEALS
# FOR THE EIGHTH CIRCUIT

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No. 89-1409WM

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Robert E. Hoover,

Appellant,

v.

Armco, Inc., and Armco Inc. Noncontributory Pension Plan,

Appellees.

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Appeals from the United States District Court for the Western District of Missouri.

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No. 89-1570WM

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Robert E. Hoover,

Appellee,

v.

Armco, Inc. and Armco Inc. Noncontributory Pension Plan,

Appellants.

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Submitted: February 15, 1990

Filed: September 25, 1990

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Before McMILLIAN, FAGG, Circuit Judges, and STROM,* District Judge.

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FAGG, Circuit Judge.

Robert E. Hoover sued Armco, Inc. and Armco's pension plan on various claims arising out of his employment with Armco. Hoover lost and the district court awarded partial attorney's fees to Armco. Hoover appeals the award of attorney's fees, and Armco cross-appeals both the amount of fees awarded and the denial of attorney's fees for defending against certain claims. We affirm.

Armco employed Hoover for twenty-four years. Hoover began his career at Armco as an engineer, but following a reduction in Armco's work force and a series of poor job performance evaluations, Hoover eventually took a job as a security guard. Hoover filed age discrimination claims against Armco, and Armco permitted him to take a twenty-two month leave of absence until the Equal Employment Opportunity Commission (EEOC) and Kansas City Human Relations Department processed his discrimination claims. Neither agency took action on Hoover's claims. Hoover returned to work in December 1985 and requested two weeks vacation in February for his annual Colorado ski trip. Armco refused Hoover's vacation request because Armco employees are not eligible for vacation until six months after returning to work from an extended leave.

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*The HONORABLE LYLE E. STROM, Chief Judge, United States District Court for the District of Nebraska, sitting by designation.

Following his evening shift on February 20, 1986, Hoover filled out an employee absentee report and left it for his supervisor. The next day, Hoover and his wife flew to Colorado to spend a week skiing with friends. After arriving in Colorado, Hoover and his wife spent the weekend in Colorado Springs visiting an ailing relative before departing to the mountains. Following six days of skiing, Hoover and his wife returned to Colorado Springs to once again visit the sick relative. Hoover and his wife flew home on Monday, March 3. Hoover first contacted Armco two days after his return, at which time he told Armco his "emergency absence" arose suddenly, and he only discovered his relative was ill the evening of February 20. Hoover had purchased the airline tickets on February 15 or 16, however. Armco fired Hoover.

Hoover brought suit against Armco claiming discriminatory demotions, failure to promote, discriminatory denial of pension under the Age Discrimination in Employment Act (ADEA), and unlawful denial of pension under the Employee Retirement Income Security Act (ERISA). Hoover later amended his complaint, claiming Armco discharged him in retaliation for filing claims with the EEOC and Kansas City Human Relations Department and for bringing this lawsuit. The district court dismissed on summary judgment Hoover's ERISA, 1982 demotion, and discriminatory denial of pension claims. A jury rejected the remaining claims. After finding Hoover brought some of his claims in bad faith, the district court awarded Armco attorney's fees on the retaliatory discharge claim and 1982 demotion claim. The present appeals followed.

We do not believe the district court abused its discretion in awarding attorney's fees to Armco. ADEA does not provide attorney's fees to a prevailing defendant. *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958, 962 (8th Cir. 1978). The district court, however, may award attorney's fees to a prevailing defendant under the bad faith exception to the American Rule. *Id.* Under the bad faith exception, a trial court may award attorney's fees to a prevailing party when it finds "the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.' " *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975) (quoting *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129 (1974)).

We agree with the district court that Hoover "deliberately walked off the job knowing [ ] his earlier request for leave had been denied[,] [ ] made no effort to contact Armco while he was away[,] and [ ] admitted[ly] [ ] spent a good portion of [his time] at ski resorts and not with his ailing [relative]." *Hoover v. Armco, Inc.*, 691 F. Supp. 184, 188 (W.D. Mo. 1988). We also agree with the district court that Hoover's "retaliation claim was brought in bad faith[,] . . . was without foundation[,] and [was] the type of case which 'should never have been filed.' " *Id.* (citation omitted). It is manifest from the record that Hoover, in blatant disregard for Armco's vacation policy, went skiing in Colorado with friends while using his relative's ill health as a subterfuge for his absence.

In our view, Hoover "intentionally advanced a frivolous contention for an ulterior purpose." *Actors' Equity Ass'n v. American Dinner Theatre Inst.*, 802 F.2d 1038, 1043

(8th Cir. 1986). After Armco fired him, Hoover brought and doggedly pursued a baseless retaliatory discharge claim out of spite. This is bad faith. *Id.* We thus follow the Supreme Court's lead that plaintiffs may properly be assessed their opponent's attorney's fees if "a court finds [the plaintiff's] claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) (construing attorney's fee statute in Title VII litigation). Furthermore, "if a plaintiff is found to have brought or continued such a claim in *bad faith*, there [is] an even stronger basis for charging [the plaintiff] with the attorney's fees incurred by the defense." *Id.* (emphasis original). The district court correctly awarded attorney's fees to Armco for defending against Hoover's retaliation claim.

The district court also found Hoover knowingly brought and pursued a demotion claim barred by the statute of limitations. Asserting a time-barred claim alone does not justify an award of attorney's fees. The statute of limitations is an affirmative defense the defendant must raise, Fed. R. Civ. P. 8(c), and Hoover did not have to anticipate Armco would raise it. Therefore, merely pleading the time-barred demotion claim was not bad faith. *See Ford v. Temple Hosp.*, 790 F.2d 342, 348-49 (3d Cir. 1986). Armco, however, did raise the statute of limitations as a defense in its answer to Hoover's original complaint. Aware of this, Hoover continued to include the time-barred claim in four amended complaints. Not until the district court granted Armco summary judgment did Hoover relinquish this claim. In our opinion, Hoover acted in bad faith by continuing to assert the time-barred

demotion claim after Armco raised an undisputed statute of limitations defense. We thus affirm the district court's award of attorney's fees for defending against this claim.

For its part, Armco claims the district court committed error by failing to award attorney's fees on Hoover's ERISA and remaining discrimination claims, and by awarding only part of the fees requested for the claims we have discussed. Reasonable attorney's fees are available to either party under ERISA, *see* 29 U.S.C. § 1132(g)(1) (1988), and the district court has discretion to award attorney's fees guided by the factors in *Lawrence v. Westerhaus*, 749 F.2d 494, 495-96 (8th Cir. 1984) (per curiam). After careful consideration of the *Lawrence* factors, we conclude the district court did not abuse its discretion in denying Armco fees on Hoover's ERISA claim. We also hold the district court exercised proper discretion in setting the amount of fees awarded and in denying attorney's fees based on Hoover's remaining age discrimination claims.

We affirm the district court.

McMILLIAN, Circuit Judge, concurring in part and dissenting in part.

I agree with the majority opinion's decision to affirm the district court order denying Armco, Inc. attorney's fees under ERISA and under the bad faith exception to the American Rule. (No. 89-1570WM, Armco, Inc.'s cross-appeal). However, I do not agree with the majority's decision to affirm the district court order granting attorney's fees to Armco under the bad faith exception (No. 89-1409WM, Hoover's appeal). Accordingly, I respectfully dissent from that part of the majority opinion.

Bad faith requires a showing of "an intentional advancement of a baseless contention that is made for an ulterior purpose, e.g., harassment or delay." *Ford v. Temple Hospital*, 790 F.2d 342, 347-49 (3d Cir. 1986); *accord Actors' Equity Ass'n v. American Dinner Theatre Institute*, 802 F.2d 1038, 1043 (8th Cir. 1986). With respect to Hoover's untimely March 1982 demotion claim, the mere filing of a time-barred claim is not frivolous as a matter of law and thus cannot be in bad faith. *Ford v. Temple Hospital*, 790 F.2d at 348. The statute of limitations is an affirmative defense; unless it is properly raised by the defense, it is waived. Fed. R. Civ. P. 8(c). Furthermore, once it became clear that the March 1982 claim was in fact untimely, Hoover did not continue to litigate this claim as a separate claim. Under these circumstances, I would hold the district court erred in finding that Hoover filed and litigated the March 1982 demotion claim in bad faith.

With respect to the retaliatory discharge claim, I cannot agree that this claim is wholly frivolous, at least for purposes of the bad faith exception. The district court did not summarily dispose of this claim; it was submitted to the jury. Moreover, even assuming for purposes of analysis that the retaliatory discharge claim was wholly frivolous, the district court did not find that Hoover advanced this claim for an ulterior purpose such as harassment or delay. Bad faith requires both a wholly frivolous contention and an ulterior purpose. *See Actors' Equity Ass'n v. American Dinner Theatre Institute*, 802 F.2d at 1043. In the absence of a finding of an ulterior purpose, I would hold the district court erred in finding that Hoover litigated the retaliatory discharge claim in bad faith.

Although I agree that Hoover's claims are certainly less than substantial, I think courts should be particularly reluctant to award attorney's fees under the bad faith exception, especially against unsuccessful plaintiffs in civil rights cases. The award of attorney's fees can have an "undesirable chilling effect on an attorney's legitimate ethical obligation to represent his [or her] client zealously." *Ford v. Temple Hospital*, 790 F.2d at 349. As noted by the Supreme Court in *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978),

> [i]t is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his [or her] action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he [or she] has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

| | | |
|---|---|---|
| ROBERT E. HOOVER, | ) | |
| Plaintiff, | ) | No. 86-0276-CV-W-8 |
| vs. | ) | (Filed |
| ARMCO, INC., et al., | ) | Aug 4, 1986) |
| Defendants. | ) | |

ORDER

Plaintiff brought suit against defendant Armco, Inc. (Armco) for violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* and against Armco and defendant Armco, Inc. Noncontributory Pension Plan for violations of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132. The court granted Armco's motion for summary judgment on plaintiff's March 1982 demotion claim. The remaining portions of plaintiff's ADEA claim, including his claim of retaliatory discharge, were tried to a jury which found in favor of defendant. The court granted defendants' motion for summary judgment on plaintiff's ERISA claims on April 6, 1988. The case is currently before the court on plaintiff's motion for a new trial on the ADEA claims and on defendants' motion for attorney's fees for both the ADEA and ERISA claims. The court will address each of these motions in turn.

I. Motion for New Trial

Plaintiff asks this court to grant a new trial because of several evidentiary rulings which he argues the court

erred in making.[1] A district court may grant a motion for a new trial if it believes that "the verdict was against the clear weight of the evidence." *Lincoln Carpet Mills, Inc. v. Singer Co.*, 549 F.2d 80, 82 (8th Cir. 1977) (citations omitted). The court should grant the motion "only where, after a review of all the evidence giving full respect to the jury's verdict, the court is left with a definite and firm conviction that the jury has erred." *Ryan By Ryan v. McDonough Power Equipment, Inc.*, 734 F.2d 385, 387 (8th Cir. 1984).

The court does not find plaintiff's evidentiary arguments persuasive nor can it hold that the jury reached a verdict unsupported by the evidence. The court made an extensive record at trial in regard to its evidentiary rulings. For example, the court permitted plaintiff's attorney to identify the properties listed on plaintiff's net worth statement that were held jointly with his wife and the properties that were held solely by his wife and children.

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[1] Specifically, plaintiff argues that the court erred by excluding evidence of allegedly discriminatory remarks made prior to the time when plaintiff's claim arose, by not allowing him to introduce evidence of Armco's financial condition in areas other than Kansas City, by prohibiting him from introducing evidence of his denial for two pension funds and by not allowing him to introduce testimony of a coemployee about his performance. Plaintiff also argues that the court erred in allowing defendant to introduce evidence of plaintiff's net worth (including figures relating to the net worth of plaintiff's wife and children) and the Kansas City Missouri Human Relations Department's finding of "no probable cause" of discrimination. Finally, plaintiff argues that the court erroneously instructed the jury on the definition of "a determining factor" and "sole cause."

Thus, plaintiff's attorney had the opportunity to argue to the jury that some information on the statement[2] did not directly pertain to plaintiff's individual net worth. Despite plaintiff's argument to the contrary, the court stands by its earlier ruling that the net worth information was relevant to the case. Defendant maintained throughout trial that plaintiff's difficulties at Armco stemmed from his poor attitude. According to defendant's theory of the case, this poor attitude was caused by the fact that plaintiff did not want to work in what he considerd [sic] a "low paying" security guard position when he was able to live comfortably from his assets and any pension benefits for which he was eligible.

Similarly, the court excluded evidence of Armco's financial condition in locations other than Kansas City and the proffered testimony of a nonsupervisory employee who would have testified about plaintiff's performance because it found that the evidence was not relevant to plaintiff's claim. Plaintiff's suggestions in support of his motion do not raise any new arguments in regard to these rulings and, therefore, the court concludes that the evidentiary rulings made at trial were correct and that substantial evidence existed from which the jury could find for defendant on the ADEA claims.

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[2] The court also noted that plaintiff provided this information to defendant during discovery. He had the opportunity at that time to provide information relating only to his own property holdings.

## II. Motion for Fees

Defendants have filed a motion to recover the attorney's fees incurred while defending this case. While the ADEA does not provide for attorney's fees to prevailing defendants, ERISA specifically states that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g). Since different standards govern the award of fees under each statute, the court will address each statute's requirements individually.

First, defendants argue that they should be awarded attorney's fees incurred in defending plaintiff's various ADEA claims: the discriminatory transfer in March 1982, the discriminatory denial of the Rule of 65 pension, the discriminatory transfer to the plant protection department in June 1983, the discriminatory failure to promote in June 1983 and the retaliatory discharge claim. Defendants argue that "[e]ach of these claims was patently without merit." Defendants' Motion at 2.

The ADEA authorizes the award of attorney's fees to prevailing plaintiffs but the statute does not authorize such an award to prevailing defendants. As a result, "attorney's fees may be awarded to prevailing defendants in age discrimination cases only under the bad faith exception to the American Rule. . . . " *Cova v. Coca-Cola Bottling Co. of St. Louis, Inc.*, 574 F.2d 958, 962 (8th Cir. 1978). The American Rule provides that "each party is responsible for his or her own fees unless a statute or enforceable contract provides otherwise." *Actors' Equity Association v. American Dinner Theatre Institute*, 802 F.2d

1038, 1041 (8th Cir. 1986). *See also Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 257 (1975).

An exception to this rule authorizes a court to award attorney's fees to the prevailing party "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.' " *Alyeska*, 421 U.S. at 257-58 (quoting *F.D. Rich Co., Inc. v. United States, ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974)). *See also Fisher v. CPC International, Inc.*, 591 F. Supp. 228, 237 (W.D. Mo. 1984). The purpose behind the exception is to punish the individual who brings a suit in bad faith rather than to compensate the victim. *Actors' Equity*, 802 F.2d at 1042. As a result, fee shifting should occur only "when extraordinary circumstances or dominating reasons of fairness so demand." *Id.* (quoting *Nepera Chemical, Inc. v. Sea-Land Service, Inc.*, 794 F.2d 688, 702 n.109-110 (D.C. Cir. 1986)).

The Supreme Court has held that fees may be awarded in a Title VII discrimination case "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 421 (1978). In determining whether an action was frivolous the district court must

> resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's

> belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. . . . . Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

*Id.* at 421-22.

While the Court in *Christiansburg* was deciding whether to award fees in a Title VII case, the reasoning applies equally to an ADEA case since both statutes provide for an award of attorney's fees only to prevailing plaintiffs. Similarities such as this one have prompted the Supreme Court to hold that the ADEA and Title VII are to be construed similarly, giving further credence to the court's view that *Christiansburg* is pertinent to this case. *See, e.g., Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979).

Mindful of the Supreme Court's admonition in *Christiansburg* not to engage in *post hoc* reasoning, the court finds that while attorney's fees should be awarded to defendant in regard to plaintiff's March 1982 demotion claim and his retaliation claim, fees should not be awarded on plaintiff's remaining ADEA claims. The court reaches this conclusion after a careful consideration of the facts presented on each of these claims.

The court granted defendants' motion for summary judgment on plaintiff's March 1982 demotion claim after finding that plaintiff did not file an EEOC discrimination charge within 180 days after the alleged conduct occurred as required by the ADEA. The court found that even if

the 120-day deferral provision of the ADEA applied, as plaintiff argued, the action was still untimely.

This court has previously held that a defendant may be awarded attorney's fees when a plaintiff files an untimely age discrimination claim with the EEOC. *See Fisher*, 591 F. Supp. at 234. Plaintiff argues, however, that filing an untimely claim is not indicative of bad faith since the filing of a charge with the EEOC "is not jurisdictional but is similar to a statute of limitations and therefore subject to equitable tolling." *Nielsen v. Western Electric Co., Inc.*, 603 F.2d 741, 743 (8th Cir. 1979). Unlike the situation in *Nielsen*, plaintiff in the present case did not make a good faith equitable tolling argument in regard to the 1982 demotion. Indeed, plaintiff conceded that "his March 1982 transfer[3] may not be remedied under [the] ADEA." Plaintiff's Suggestions in Opposition to Defendant's Motion for Partial Summary Judgment at 3. As a result, the court finds that attorney's fees should be awarded with regard to plaintiff's March 1982 demotion claim.[4]

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[3] The words "transfer" and "demotion" were used interchangeably by the parties in their briefs and throughout trial.

[4] Plaintiff argues here, as he did in his opposition to the summary judgment motion, that he pled the March 1982 demotion because it was relevant to defendant's subsequent discriminatory intent. This explanation does not provide a basis for pleading the demotion as an additional claim, however. Complaints should contain "only a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The complaint need not contain the evidentiary basis for each of plaintiff's allegations. *See, e.g., Miener v.*

(Continued on following page)

Similarly, defendant should be awarded attorney's fees for the expenses incurred defending plaintiff's retaliation claim. In this charge plaintiff alleged that he was discharged from his position as a security guard in retaliation for the fact that he had filed discrimination complaints with respect to his previous two demotions. Defendant, on the other hand, argued that it discharged plaintiff after he took an unauthorized vacation. The unrebutted testimony at trial was that plaintiff took annual ski vacations to Colorado with his wife and several other couples. In late 1985 or early 1986 he had asked for time off so that he could take this annual vacation in February 1986. Armco officials told plaintiff he could not take a vacation since he had just returned from a leave of absence on December 2, 1985.[5]

On February 20 plaintiff submitted an Employee Absentee Report stating that he would not be at work the following day. On February 21 plaintiff and his wife flew

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(Continued from previous page)

*Special School District of St. Louis County, Missouri*, 607 F. Supp. 1425, 1427 (E.D. Mo. 1985), *aff'd in part, reversed in part sub nom., Miener by and through Miener v. State of Missouri*, 800 F.2d 749 (8th Cir. 1986) ("[a] complaint is sufficient if it 'contain(s) allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial.' ") (quoting 5 Wright & Miller, *Federal Practice and Procedure*: Civil § 1216 at 20 (1969)). Therefore, plaintiff's argument, which suggests that he had to plead the March 1982 demotion, must fail.

[5] This leave of absence was requested by plaintiff and lasted until the EEOC completed the processing of his previously filed complaints.

to Colorado to visit his ailing father-in-law. Plaintiff testified that he did not have time to ask permission to leave because he found out about his father-in-law's illness the evening of February 20 when he spoke with his mother-in-law. He explained that his wife had planned to leave for Colorado on February 21 and that he decided to go with her at the last minute after hearing about his father-in-law's illness. He testified on cross-examination, however, that the tickets had been purchased on February 15 or 16, four or five days before he learned about his father-in-law's illness.

Plaintiff and his wife visited his father-in-law in Colorado Springs for two or three days and then spent a week skiing at Breckenridge and Copper Mountain. After the ski trip ended they returned to Colorado Springs, visited with his father-in-law briefly, and then returned to Kansas City. When plaintiff arrived at work two days after his return from Colorado[6] Armco officials asked him to turn in his badge and told him that they would be in touch with him. A week later an Armco official told plaintiff that he had been dismissed.

Based on these facts the court agrees with defendant's contention that the retaliation claim was brought in bad faith. Plaintiff deliberately walked off the job knowing that his earlier request for leave had been denied. He made no effort to contact Armco while he was away and he admitted that he spent a good portion of the week at ski resorts and not with his ailing father-in-law.

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[6] Plaintiff testified he did not return to work immediately because he did not know if he was scheduled. He made no effort to call Armco and ask if he was to be at work.

Based on these facts the court holds that plaintiff's retaliation claim was without foundation and is the type of case which "should never have been filed." *Fisher*, 591 F. Supp. at 237. As a result, defendants are entitled to all fees incurred defending this claim.

The court will deny defendant's motion as to plaintiff's remaining ADEA charges.[7] Although the court holds today that evidence existed to support the jury's verdict for defendant, the court does not find that this evidence was so totally unbalanced that the remaining claims may be called "unreasonable or without foundation." *Christiansburg*, 434 U.S. at 421. Thus, while hindsight might suggest that these claims should not have been brought, the court cannot hold that they were brought in bad faith. As a result, defendant's motion will be denied as to these claims.

## III. ERISA Claims

Count III of plaintiff's complaint alleged that defendants arbitrarily and capriciously denied his applications for Rule of 65 and Rule of 70/80 pensions. On April 6, 1988, the court granted summary judgment on this claim, noting that federal courts can overturn decisions of private pension fund fiduciaries "only if the decision is arbitrary, capricious or an abuse of discretion." *Lawrence v. Westerhaus*, 780 F.2d 1321, 1322 (8th Cir. 1985). *Accord Redman v. Burlington Northern Railroad Company Pension*

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[7] These claims include the discriminatory denial of the Rule of 65 pension, June 1983 demotion to plant protection and the June 1983 discriminatory failure to promote.

*Plan*, 821 F.2d 461, 465 (8th Cir. 1987). April 6 Order at 6. After reviewing the requirements for each of the pensions the court found that plaintiff did not meet the eligibility criteria for either plan. Consequently, the court held that the decision to deny the pensions was not arbitrary or capricious and defendant's motion for summary judgment was granted. *Id.* at 7.

ERISA provides that a district court may award reasonable attorney's fees to either party. *See* 29 U.S.C. § 1132(g). Like several other circuits,[8] the Eighth Circuit has held that district courts determining whether to award fees in ERISA cases should consider five factors:

> (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of attorney's fees; (3) whether an award of attorney's fees against the opposing parties could deter other persons acting under similar circumstances; (4) whether the parties requesting attorney's fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal qeustion [sic] regarding ERISA itself; and (5) the relative merits of the parties' positions.

*Lawrence v. Westerhaus*, 749 F.2d 494, 496 (8th Cir. 1984), (quoting *Ironworkers Local No. 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980)). In addition to considering these factors, the court must also consider Congress' purpose in enacting ERISA "of protecting employee benefit plan participants by providing 'ready access to the federal

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[8] *See, e.g., Monkelis v. Mobay Chemical*, 827 F.2d 935, 936 (3rd Cir. 1987); *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550, 557 (6th Cir. 1987); *Gray v. New England Telephone & Telegraph*, 792 F.2d 251, 258 (1st Cir. 1986).

courts.' " *Anderson v. Alpha Portland Industries, Inc.*, 752 F.2d 1293, 1300 (8th Cir.), *cert. denied*, 471 U.S. 1120 (1985) (quoting 29 U.S.C. § 1001(b)). *See also Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1356 (8th Cir. 1980) ("ERISA . . . is remedial legislation that should be construed liberally in favor of those persons it was meant to benefit and protect, namely, participants in and beneficiaries under covered pension and welfare plans. . . . ").

Considering both the purpose behind ERISA and the five factor test announced by the Eighth Circuit in *Lawrence*, the court finds that fees for defending against the ERISA claim should not be awarded in this case. Although the court rejected plaintiff's argument that genuine factual issues remained as to whether plaintiff's retirement would be "mutually satisfactory" and as to the definition of "suitable long-term employment," the court does not find that these arguments were made in bad faith. Thus, the first factor weighs against an award of fees. While plaintiff's net worth statement indicates that he may be able to satisfy an award of attorney's fees, such an award could deter other individuals from bringing ERISA suits.[9] The fourth factor of the test, whether plaintiff sought to benefit all participants of a plan, weighs against him since the suit concerned only the denial of his individual applications. The final factor, the relative merits of the parties' positions, weighs against an

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[9] The court is somewhat perplexed over this factor since an award of attorney's fees would always seem to have some deterrent effect. In any event, the court finds that this factor weighs in favor of plaintiff in this case since the court must construe ERISA in favor of those it is designed to protect.

award of fees since each side made good faith arguments.[10] In sum, factors one, three and five weigh in plaintiff's favor while only factors two and four favor defendants. Consequently, the court will not award fees to defendants for plaintiff's ERISA claim.

Defendants have submitted copies of billing statements for all work done on this case. Since the court's order grants fees only for part of these expenses defendants are directed to submit an affidavit detailing the fees incurred in defending the March 1982 demotion claim and the retaliation claim. The court will then give plaintiff an opportunity to respond to the affidavit before entering an order awarding fees. Accordingly, it is

ORDERED that plaintiff's motion for a new trial is denied. It is further

ORDERED that defendant Armco's motion for attorney's fees is granted insofar as it requests fees for expenses incurred in defending plaintiff's March 1982

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[10] In its motion defendants urge this court to apply the test adopted by the Seventh Circuit in *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820 (7th Cir. 1984). In *Bittner* the Seventh Circuit found that a court determining whether fees should be awarded in an ERISA case must bear in mind that "a modest presumption" exists in favor of awarding fees to the winning party, "unless the loser's position, while rejected by the court, has a solid basis – more than merely not frivolous, but less than meritorious." *Id.* at 830. Defendants apparently abandoned this position in their reply brief. Even if the argument had not been abandoned, the court would not have applied *Bittner* because no other circuit has adopted the test and because this court is obliged to follow Eighth Circuit precedent and apply the five-factor test.

demotion claim and his retaliation claim. The motion is denied in every other respect. It is further

ORDERED that the motion of defendant Armco, Inc. Noncontributory Pension Plan for attorney's fees is denied. It is further

ORDERED that within fifteen days of the date of this order defendant Armco submit an affidavit detailing fees incurred in defending the 1982 demotion and retaliation claims. Plaintiff will then have fifteen days to respond to the affidavit.

/s/ Joseph E. Stevens Jr
JOSEPH E. STEVENS, JR.
UNITED STATES DISTRICT JUDGE

August 4, 1988

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1409WM

| | | |
|---|---|---|
| Robert E. Hoover,<br>Appellant,<br>vs.<br>Armco, Inc., and Armco Inc. Noncontributory Pension Plan,<br>Appellees. | ) | Appeal from the United States District Court for the Western District of Missouri. |

No. 89-1570WM

| | | |
|---|---|---|
| Robert E. Hoover,<br>Appellee,<br>vs.<br>Armco, Inc. and Armco Inc. Noncontributory Pension Plan,<br>Appellants. | ) | Appeal from the United States District Court for the Western District of Missouri. |

Appellant Hoover's petition for rehearing has been considered by the court and is denied.

November 20, 1990

ORDER ENTERED AT THE DIRECTION OF THE COURT

/s/Robert D. St. Vrain
CLERK, UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

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